82-195 No. 82-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

—vs.—

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota Statute which provides $500 and $700 income tax deductions for parents who pay tuition for the education of children attending elementary and secondary schools, whose benefits flow overwhelmingly to parents of children attending pervasively religious nonpublic schools, and which thereby creates the "encouragement and reward" for sending children to parochial schools forbidden in Committe for Public Education v. Nyquist, 415 U.S. 756, 791 (1973), violate the Establishment Clause of the First Amendment?

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OPINIONS BELOW

The District Court Opinion is reported at 514 F. Supp. 998. The opinion of the Court of Appeals for the Eighth Circuit is unreported. See Pet. App. A-1.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Eighth Circuit entered April 30, 1982.

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363. As used in this subdivision, "textbooks"

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[1] 42 U.S.C.A. § 2000c et seq.

shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

STATEMENT OF THE CASE[2]

1. Minn. Stat. § 290.09, Subd. 22 grants a deduction from gross income for those amounts paid by the taxpayer to others for tuition, textbook and transportation expenses of dependents enrolled in grades K-6 and 7-12, not to exceed $500 and $700 respectively. Certain textbook and transportation expenses are also includable in these amounts.

Insofar as tuition is concerned, no provision is made to limit the deduction to expenses incurred solely for secular instruction. Deductible textbook expenses are specifically defined to include books as well as other instructional materials and equipment

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[2]The parties are as listed in the caption.

used for teaching courses customarily taught in Minnesota's public schools, but not to include books or other materials and equipment used to inculcate religious doctrine. In practice, the textbooks and materials for which reimbursement is available will be only those books and materials not already used in the public schools, because Minnesota already requires public provision of educational aids such as textbooks, standardized tests, and pupil support services to nonpublic school students to the same extent that such aids are provided to public school students, under statutory provisions similar to those upheld in Board of Education v. Allen, 392 U.S. 236 (1968) and its progeny. See Minn. Stat. Ann. §§ 123.931 - 123.947 (West Supp. 1982). Textbook and transportation

expenses incurred in association with extra-curricular activities are not deductible.

Despite the apparent formal neutrality and facial breadth of the class benefited by the statute's terms, the record makes clear that the benefits actually flowing to public school children and their parents are extremely minimal. Insofar as the tuition deduction is concerned, which the Court of Appeals agreed was the principal benefit provided by the statute, public schools in the State of Minnesota do not generally charge tuition. The record discloses that for the school year 1978-1979, out of 805,155 public elementary and secondary school students, only 79 students paid tuition for

attendance at Minnesota public schools. See Defendants' Supplemental Response to Plaintiffs' Request for Admission, and Affidavit of James A. Lee, Jr. During 1977-1978, only 40 students paid for public school instruction. See Affidavit of James A. Lee, Jr.

By contrast, the number of school children attending tuition-charging nonpublic schools in Minnesota during the 1979-1980 school year was 90,954. Of these, 86,808 (95.44%) attended schools considering themselves to be sectarian. For the 1978-1979 school year, 88,524 students attended nonpublic elementary and secondary schools. Of this number, 85,243 (96.29%) attended sectarian schools. See Affidavit of Michael J. Lovett, and Defendants' Supplemental

Response to Plaintiffs' Request for Admission, respectively.

Some public school students are charged certain other fees for specialized instruction services, including driver's educaion. Minn. Stat. Ann. § 120.73 (West Supp. 1982). Records of the State Department of Education indicate that their Account Code 1-10.21, which includes monies received by public school districts for tuition and non-academic charges including driver's education, during the 1978-1979 school year, totalled $2,005,142. See Affidavit of Ronald Moir. Minnesota authorities have denied that they have any records which would detail the portion of this amount collected for extra-curricular activities, or the

portion of this amount for which taxpayers claim deductions.[3]

Fees charged by public schools for items categorized as textbook and transportation expenses are reported in Account Code 1-10.38 Id. The $907,204 reported therein reflect those limited charges which public school districts may charge pupils under law. Minn. Stat. Ann. § 120.71-120.76 (1980). Not all these expenses are deductible under the challenged statute; and again, the state

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[3] As the record below and the lower court decisions indicate, Minnesota has implemented the tuition tax deduction program in such a way as to ensure the absence of any meaningfully detailed information regarding the actual amounts of income deducted, actual tax loss to the state, and the extent to which deductions were taken for tuition for pervasively religious instruction. In our view, that failure has a significant bearing on the judgment below. See fn. 7 infra.

has no records from which to ascertain what proportion of these expenses are deducted.

Revenue loss to the State of Minnesota as a result of the challenged statute was estimated annually at $2.4 million.[4] See Defendants' Response to Plaintiff's Request for Admission and Interrogatories.

2. This action was commenced in the United States District Court for the District of Minnesota in June, 1980, by five Minnesota taxpayers, three of them of whom were subsequently dismissed as plaintiffs. Pet. App. A-56-57. Jurisdiction of the Court was invoked

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[4]Taxpayers availing themselves of Minnesota's "standard deduction" are not currently permitted to make use of the deduction. Minn. Stat. Ann. § 290.09, Subd. 15. (West. Supp. 1982).

pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983. The District Court granted defendants' motion for summary judgment and dismissed the complaint by Order of May 13, 1981.

On appeal to the United States Court of Appeals for the Eighth Circuit, the district court's judgment was affirmed. Writing for the panel, Judge Lay conceded that the statute before it was "identical" to a statute struck down by the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980), and that the overall proofs were nearly so. The Eighth Circuit nevertheless disagreed with the First Circuit's judgment in Norberg that a tuition tax deduction for elementary and secondary education whose benefits flow in substantial measure to

the tiny proportion of students in religious schools is not rendered constitutional by a formalistic inclusion of various other expenses paid by public school students. The conflict, the court indicated, would have to be resolved by this Court. Pet. App. A-29. Addressing itself principally to the tuition deduction, the Eighth Circuit held that the tuition tax deduction did not have a primary effect of advancing religion because the statute was "neutral on its face" (Pet. App. A-44), and did not expressly "singl[e] out a class of citizens for special economic benefit". Pet. App. A-43. The court also found it relevant that whereas in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) the tax benefit received by each parent of a parochial school child was an arbitrary definite amount, the benefit in

Minnesota was "more diffused and less certain", since only taxpayers who move from a higher bracket to a lower one as a result of the tax deductions are actually benefited.

REASONS FOR GRANTING THE WRIT

This case concerns another of the "ingenious plans for channeling state aid to sectarian schools that periodically reach this Court . . ." Committee for Public Education v. Nyquist, 413 U.S. at 785. In a series of cases rejecting increasingly sophisticated but equally unconstitutional attempts to funnel public tax monies to sectarian schools, this Court has steadfastly held that substantial aid to the educational function of pervasively religious elementary and secondary schools necessarily aids the sectarian school enterprise as a whole, and thereby violates the First Amendment's Establishment Clause.

This Court's judgments have not depended on the form public tax

support for religious education has taken. Instead, the Court has looked to the effect of the aid, regardless of whether it has been provided in the form of teacher salary supplements, Lemon v. Kurtzman 403 U.S. 602 (1971), flat tuition reimbursements to parents, grants to schools for maintenance and repair or tuition tax deductions, Committee for Public Education v. Nyquist, supra, the provision of auxiliary educational services to students or the loans of instructional materials and equipment to schools, Meek v. Pittenger, 421 U.S. 349 (1975), or the loan of such materials to parents, Wolman v. Walter, 433 U.S. 229 (1977). Where that effect is to "relieve [parents of] their financial burdens sufficiently to assure that they continue to have the option to send their children

to religion-oriented schools", Committee for Public Education v. Nyquist, 413 U.S. at 783, state aid programs have been struck down as unconstitutionally aiding religion, despite the "unexceptionable" purposes for which such aid has been enacted. Id. The decision below conflicts with each of those decisions and cannot be reconciled with this Court's Establishment Clause jurisprudence. A writ of certiorari should be granted to resolve that conflict.

The decision below also conflicts squarely with a recent First Circuit decision striking down on nearly identical facts a tax deduction scheme identical to that upheld below. Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). Unlike the

First Circuit's decision in Norberg, which was faithful to this Court's Establishment Clause cases, the Eighth Circuit's judgment upholding tuition tax credits can only be viewed as an open invitation to this Court to abandon the clearly demarcated (if not analytically tidy) lines between the permitted and the forbidden that have emerged and prevailed since this Court's first exploration of this ground in Everson v. Board of Education, 330 U.S. 1 (1947).

Few cases present this Court with questions as obviously worthy of certiorari as this. Whether "a charge [can be] made upon the state for the purpose of religious education" (Committee for Public Education v. Nyquist, 413 U.S. at 791 (citation omitted)) is a question that has occupied

this Court's attention for more than three decades. But as this case makes clear, repeated assertions that the state may neither encourage nor reward parents who send their children to sectarian schools, and may not reduce the costs of such education by creative provision of tax funds, have not had the intended effect. Certiorari is required to enforce obedience to law settled by this Court.

I. THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

The decision rendered by the Eighth Circuit below directly conflicts with the decision of the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). As the Eighth Circuit recognized:

> [O]ur analysis places us in apparent disagreement with Norberg. We find

> the issue before us significant, not only to the State of Minnesota but to the Nation. Eventually, if not within the parameters of this case, the Supreme Court must decide whether statutes such as those in Rhode Island and Minnesota can survive constitutional scrutiny. Pet. App. 58-58.

The decision below is also in clear conflict with the Third Circuit's decision in Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir.), aff'd mem. 442 U.S. 907 (1979), notwithstanding the Eighth Circuit's attempt to distinguish Byrne on the ground that the Minnesota tuition tax deduction (unlike the New Jersey tuition tax deduction) extends on its face to public school tuition payments.

In all three cases, state statutes were enacted encouraging and supporting parents to send their children to private, sectarian schools by providing

fixed and substantial tax deductions for tuition actually paid out and certain other expenses. Each statute was defended on the ground that tax exemptions were theoretically available not only to students attending sectarian schools, but to others as well.[5] Two out of the three challenged statutes, but not the statute at issue here, were struck down on the ground that the "true color of the tuition deduction" is shown

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[5]In Minnesota, as in Rhode Island, the benefits theoretically extended to parents paying public school tuition, although in fact such parents represent an extremely small proportion of parents with school-age children. New Jersey attempted to defend its statute by pointing to deductions available both to parents of children attending non-sectarian private schools, and to parents paying tuition to public and private universities, and to a variety of other deductions available in situations where taxpayers were likely to incur "added expenses". 590 F.2d at 519.

by its disproportionate encouragement of parents to send their dependents to religious schools, a forbidden primary effect under the Establishment Clause. Norberg, 630 F.2d at 859; Byrne, 590 F.2d at 518.

As this Court is well aware, the political pressure in many states and in Congress to aid parents of children attending sectarian schools is endemic. A new scheme enacted in one jurisdiction is quickly adopted in others. The Eighth Circuit's decision upholding tuition tax credits will quickly lead to a rash of similar new statutes; the First and Third Circuits' decisions will just as surely be relied on in the litigation which will swiftly and surely be brought to prevent such statutes from taking effect. The issues presented in resolving the conflict

this case squarely presents have now been fully ventilated in three courts of appeals. (Indeed, as we argue infra, we believe that they have been resolved by this Court.) Further lower court challenges will not aid this Court's resolution of the issues. Certiorari is warranted, now, to resolve the pressing conflict.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

This Court has twice struck down state statutes providing parents sending children to sectarian schools with tax benefits constitutionally indistinguishable from those upheld below by the Eighth Circuit. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Byrne v. Public Funds for Public Schools, 442 U.S. 907 (1979), aff'g

Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir. 1979). Certiorari should issue to correct the Eighth Circuit's misapprehension of governing law.

In Committee for Public Education v. Nyquist, this Court applied its three-pronged test under the Establishment Clause developed in Lemon v. Kurtzman, 403 U.S. 602 (1971), to a New York statute which inter alia provided financial benefits in the form of a deduction from taxable income to parents of children attending nonpublic schools in the state. 413 U.S. at 789-798. The Court struck down the tuition tax deduction program, holding:

> [I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

413 U.S. at 793. That holding was apparently followed in 1979 when this Court summarily affirmed a decision of the Third Circuit striking down another variant of a tuition deduction plan for parents of children in elementary and secondary schools. Byrne v. Public Funds for Public Schools, supra. See also Sloan v. Lemon, 413 U.S. 825 (1973) (tuition reimbursement).

The clear conflict between Nyquist and Byrne, on the one hand, and this case, on the other, cannot be avoided by relying on the meritless distinctions that the Eighth Circuit attempted to draw. The Eighth Circuit attempted to distinguish this case on the ground that the class benefited included more than parents of children in sectarian school. But the fact that substantial numbers of

parents of children attending nonsectarian schools entirely secular in character also benefited under the statute did not deter this Court from holding in Nyquist that the primary effect of the statute was to advance religion. To the contrary, although the Nyquist court observed that the tax benefits it struck down were not available to parents of public and private school children in comparable amounts, it reached its decision without reliance on this factor, which was addressed as merely providing additional support for the Court's holding. See 413 U.S. at 782 n.38, 793-94.

Moreover, even assuming arguendo that the breadth of the class affected was the controlling factor in Nyquist and Byrne, the ostensible breadth of the class of

beneficiaries under Minnesota's law is illusory. Although § 290.09 permits deduction of expenses incurred by parents of children in public schools as well as nonpublic schools, the record demonstrates that the overwhelming proportion of taxpayers allowed deductions, and the overwhelming proportion of income deductible under the statute, qualify by reason of expenditures directly related to religious education. By calculating the greatest portion of revenue loss which could be attributed to deductions taken by parents of children attending nonsectarian schools (public or nonpublic-nonsectarian), petitioners demonstrated to the courts below that, at its theoretically broadest scope, only 29% of the dollar benefit afforded under the

challenged statute can possibly be associated with expenses for nonsectarian education.[6] For the 1978-1979 school

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[6]Although the record plainly establishes that at least 71% of the dollar benefits available under the statute flow to the relatively small number of parents whose children attend sectarian schools, a proportion petitioners believe amply supports their conclusion that the challenged statute must be struck down under Nyquist and Byrne, in practice, the actual figure is probably much higher. See Brief for Appellants with the Eighth Circuit at 11. The absence of more exact evidence is wholly attributable to the state, which has designed the program and the tax forms implementing it in such a way as to make more specific evidence impossible to collect without individualized discovery of millions of taxpayers, an obvious impossibility. Under these circumstances, as plaintiffs urged in the Court of Appeals, if summary judgment striking down the statute was judged impossible absent further evidentiary materials concerning the actual incidence of tax benefits, the case should have been remanded with the burden of producing additional data shifted to the State, which alone is in a position to compile it by amending the tax forms to require line itemization of

year, the approximately 820,000 students in both public and nonsectarian private schools claimed a maximum of $5.2 million in deductions, an average of $6.35. On the other hand, the approximately 85,000 students attending religiously affiliated schools deducted a minimum total of

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6 (continued)

deductions taken on the challenged statute. The approach taken by the Court of Appeals--essentially to presume accrual of the statute's benefits to all state taxpayers in the absence of firmer evidence than presently can be compiled from the state's records -- prevents analysis of the challenged statute beyond its face, an approach patently inconsistent with the more penetrating analysis required by this Court's Establishment Clause jurisprudence. See, e.g., Committee for Public Education v. Nyquist, Supra; Wheeler v. Barrera, 417 U.S. 402 (1974).

[7]The Court of Appeals was uncertain as to the source of this figure. Pet. App. A-16. The figure comes from Defendant's Supplemental Response to Plaintiff's Request for Admissions and Affidavit of Michael J. Lovett.

approximately $12,568,731.00, an average deduction of $147.81. This represents a ratio of 23:1.

The Court of Appeals' reliance on the facial breadth of the benefited class fares no better when attention is focused on discrete items for which deductions may be taken.

Insofar as tuition is concerned, in light of the fact that school year tuition was paid only by 79 and 40 public school students in 1978 and 1979 respectively, see supra at 3-4, any suggestion that the tuition deduction affects a broad class is simply untenable.

In analyzing transportation expenses, the Court of Appeals relied on the permissible nature of public aid under the Everson v. Board of Education, 330 U.S. 1 (1947), neglecting the fact that

transportation to and from school in Minnesota is already granted by separate statute on an equal basis to students in both public and private schools. Minn. Stat. §§ 123.78-123.80. Therefore, transportation expenses deducted under the challenged statute must be for services beyond those provided to students in public schools. Under the controlling authority of Wolman v. Walter, 433 U.S. 229, 252-255 (1977), such expenses would appear to be plainly forbidden, especially in light of the total absence of any provision for supervision by public authorities. 433 U.S. at 254. In regard to textbooks, even the Court of Appeals was troubled by the fact that textbooks were already given to the students in sectarian private schools in statutes analogous

to those previously reviewed by this Court. Therefore, textbook expenses deducted under the challenged statute must be for textbooks beyond those provided to students in public schools, aid which transgresses the limitations of Board of Education v. Allen, 392 U.S. 236 (1968) as reaffirmed in Wolman v. Walter, 433 U.S. at 236-238, 251 n.18. In short, the Court of Appeals' focus on the surface configuration of the statute, which purports to grant broad relief to all Minnesota taxpayers with children enrolled in schools and not primarily to those with children attending sectarian private schools, is contrary to Nyquist and without substance or merit.

Nor does the Eighth Circuit's attempt to rely on Walz v. Tax Commission, 397 U.S. 664 (1970) disguise the sharp

conflict between this case and Nyquist. The Nyquist court considered and rejected precisely those arguments based on Walz relied on below. Insofar as it had rested on longstanding historical usage Walz was found inapposite in Nyquist because

> it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court.

413 U.S. at 792. Insofar as the property tax exemption in Walz served not "to support or to subsidize, but . . . to minimize involvement and entanglement," 413 U.S. at 793, it was also found inapposite, since the Court has insisted that states may not assume that publicly-supported sectarian teachers will refrain

from inculcating religious beliefs and that they affirmatively police the secularity of their grants. See Nyquist, 413 U.S. at 778 & n.35. Notably, the Minnesota statute challenged here does not provide for that required supervision. In addition to these distinctions, which the Nyquist court found dispositive and which make Walz inapposite here, Nyquist emphasized Walz's inapplicability to school aid legislation by pointing out that school aid programs, unlike the property tax exemption upheld in Walz, require annual appropriations carrying a great danger of political entanglement and religious strife along sectarian lines. 413 U.S. at 794-798.[8]

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[8]That recurring danger is exemplified by a bill in the Minnesota

Finally, the Court of Appeals also attempted to justify the tuition tax deduction scheme on the ground that it was a "genuine tax deduction". Pet. App. A-39. That attempted justification is unavailing. Although as the Court of Appeals observed Nyquist reserved the question whether a "genuine tax deduction, such as for charitable contributions . . . is constitutionally acceptable under the 'neutrality' test in Walz", 413 U.S. at 790 n.49, the Minnesota deductions share precisely the characteristics of the deduction plan struck down in Nyquist, and none of those which might be considered analogous to

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8 (continued)

Legislature that would double the deductions currently available. HF 242, 1981-82 Sess.

charitable contributions. Like the deductions invalidated in Nyquist, those available in Minnesota are not measured by actual expenses, but instead are generally a fixed amount provided in the statute. See 413 U.S. at 790. Similarly, the Minnesota deductions, like the New York deductions in Nyquist, are "unrelated to, and not reduced by any deductions to which [the taxpayer] may be entitled for charitable contributions to religious institutuions." Id. Most importantly, unlike genuine charitable contributions, the payments for which both New York and Minnesota attempted to permit deductions represent services purchased, which have never been deductible because a payment for which the contributor derives a direct and equivalent benefit is not a charitable

contribution at all. Taxpayers are free under Nyquist and Walz to make genuine charitable contributions to religious institutions and to take charitable deductions if they so choose; but the expense of sending a child to a parochial school is no more a "charitable contribution" than is tuition paid to Harvard University.

By relying on a surface neutrality that is belied by the facts, and by engaging in the transparent ipse dixit of labeling tuition paid for parochial school a "charitable contribution" entitled to constitutionally valid tax deductions under the limited neutrality test of Walz, the Eighth Circuit has decided this case in a manner directly conflicting with this Court's decisions

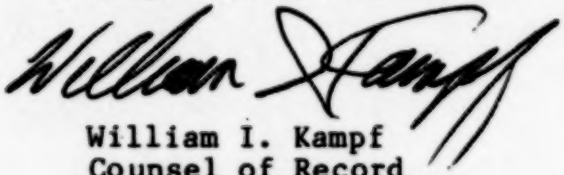
in Nyquist and Byrne. Certiorari should issue to resolve that conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, and either summarily reverse or set the case for full argument. In the alternative, if for reasons set forth, supra, at fn.6, the Court concludes that the record provides insufficient evidence on which to adjudicate the constitutionality of the challenged statute as a result of the inadequate statistics maintained by defendants, certiorari should be granted, the judgment below vacated, and the case remanded with instructions to require

defendants to compile statistics to augment the record.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1569

Van D. Mueller, et al,	*	
	*	Appeal from the
	*	United States
Appellants,	*	District Court
	*	for the District
v.	*	of Minnesota
	*	
Clyde E. Allen, Jr., et al,	*	
	*	
	*	
Appellees.	*	

Submitted: December 15, 1981
Filed: April 30, 1982

Before LAY, Chief Judge, HENLEY and ARNOLD, Circuit Judges.

LAY, Chief Judge.

Minnesota Statute § 290.09, subdivision 22, authorizes a limited income tax deduction to Minnesota taxpayers for certain school-related expenses incurred on behalf of

dependents. The plaintiffs-taxpayers in this action claim that the statute advances an establishment of religion and restrains free exercise of religion in violation of the first and fourteenth amendments of the United States Constitution. The district court granted the Commissioner's and intervening taxpayers' motions for summary judgment and held that the statute is "neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion." Mueller v. Allen, 514 F. Supp. 998, 1003 (D. Minn. 1981).[1] This appeal

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[1]In an earlier suit the same statute withstood a similar constitutional attack before a three-judge court. M.C.L.U. v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978) (Alsop, J., dissenting). The district court ruled that this judgment was res judicata

followed. We affirm the the judgment of the district court.

Facts.

Section 290.09, subdivision 22,[2] authorizes a deduction to gross income

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1 (continued)
as to certain individual plaintiffs who were plaintiffs in the original action. Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981).

[2]Section 290.09, subdivision 22, provides for the following deduction from gross income in computing net income:

> Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which

for tuition, textbook, and transportation expenses incurred on behalf of dependents

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2 (continued)

> adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

Minn. Stat. Ann. § 290.09, subd. 22 (West Supp. 1982).

The law providing deductions for tuition and transportation expenses was originally enacted in 1955 and later revised in 1976 and 1978.

attending elementary or secondary schools. The deduction is limited to actual expenses incurred up to a $500 maximum per dependent in grades K to 6 and a $700 maximum per dependent in grades 7 to 12. Deductible expenses under subdivision 22 are restricted to those incurred in conjunction with schools which, inter alia, enable a Minnesota resident to fulfill state compulsory attendance laws. This restriction apparently encompasses public and nonpublic, secular and sectarian, educational institutions.

The district court found deductible tuition expenses to include:

1. Tuition in the ordinary sense.

2. Tuition to public school students who attend public schools outside their residence school districts.

3. Certain summer school tuition.

4. Tuition charged by a school for slow learner private tutoring services.

5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.

6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.

7. Montessori School tuition for grades k through 12.

8. Tuition for driver education when it is part of the school curriculum.

514 F. Supp. at 1000.[3]

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[3]The court below further determined that deductible transportation expenses included:

> [T]he cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who live in one district but attend school in another, and the cost of transporting

The statute itself restricts deductible textbook expenses by excluding expenditures for books for courses not legally and commonly taught in public schools, books whose purpose is to teach or inculcate religious tenets, doctrines or worship, and books or materials for certain extracurricular activities[4].

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3 (continued)

students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance. 514 F. Supp. at 1000.

[4]The district court found that textbook deductions include not only secular textbooks subject to these restrictions, but also certain requisite equipment, including:

1. Cost of tennis shoes and sweatsuits for physical education.

2. Camera rental fees paid to the school for photography classes.

3. Ice skates rental fee paid to

The district court found that subdivision 22 operates as a true tax "deduction," as opposed to a "credit." The taxpayer realizes a tax benefit only in the event that the resulting decrease in net taxable income places the taxpayer

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4 (continued)
the school.

4. Rental fee paid to the school for calculators for mathematics classes.

5. Costs of home economics materials needed to meet minimum requirements.

6. Costs of special metal or wood needed to meet minimum requirements of shop classes.

7. Costs of supplies needed to meet minimum requirements of art classes.

8. Rental fees paid to the school for musical instruments.

9. Cost of pencils and special notebooks required for class.

514 F. Supp. at 1000.

in a lower tax bracket. 514 F. Supp. at 1000.

Plaintiffs contend that statistical evidence allegedly demonstrates that an overwhelming majority of taxpayers who utilize the deduction authorized by Minn. Stat. § 290.09, subd. 22, have dependents attending parochial schools; thus, it is urged that the statute has the primary effect of supporting and advancing religion in violation of the Establishment clause of the first amendment. Plaintiffs also argue that the statute does not have a valid secular purpose and that it fosters an impermissible entanglement between church and state.

Analysis.

The first amendment states in part that "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., amend. I.[5] Despite the apparent absolute prohibition contained in the Establishment and Free Exercise Clauses, a strict policy of total separation of church and state has been neither advocated nor enforced in this nation. As Justice Powell observed, existing standards do not necessarily afford "bright line" guidance. Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973).

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[5]This mandate is made applicable to the states by the Due Process Clause of the fourteenth amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

Without repeating the history of the Establishment Clause,[6] we note that, although a law may be one respecting the establishment of religion while aiding all religions equally and without promoting a state religion, See Everson v. Board of Education, 330 U.S. 1, 15 (1947), a law that indirectly benefits religion or religious institutions is not invalid per se on those grounds. See,

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[6]See Everson v. Board of Education, 330 U.S. 1, 8-16 (1947) (Black, J.), 28, 28-41 (Rutledge, J., dissenting), for a discussion of the history of the Establishment Clause. See also L. Tribe, American Constitutional Law 813-19 (1978). For the developments in this area involving religion and education, see, e.g., Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 S.Ct. Rev. 147 (1971); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513 (1968); Morgan, The Establishment Clause and Sectarian Schools: A Final Installment?, 1973 S.Ct. Rev. 57 (1973).

e.g., Wolman v. Walter, 433 U.S. 229 (1977) (law providing loan of textbooks purchased with state funds and provision of diagnostic services to nonpublic schools upheld); Hunt v. McNair, 413 U.S.734 (1973) (law providing aid to church colleges through revenue bonds for construction upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (law providing grants to church colleges for construction of buildings used for secular purposes upheld); Walz v. Tax Commission, 397 U.S. 664 (1970) (law providing real estate tax exemptions to churches upheld); Board of Education v. Allen, 392 U.S. 236 (1968) (law providing for loan of state textbooks to nonpublic schools upheld). See also Widmar v. Vincent, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981) (Establishment Clause does not

preclude use of state university facilities by registered student religious organization).

Much of the recurring case law in this area has evolved around the troublesome relationship between religion and education, see Nyquist, 413 U.S. at 772, and, while seemingly inconsistent, has developed into a three-part test. In order to pass constitutional muster, a statute which allegedly violates the Establishment Clause must, first, have a secular legislative purpose; second, have a principal or primary effect that neither advances nor inhibits religion; and third, not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Plaintiffs allege that Minn. Stat. §

290.09, subd. 22, does not satisfy the secular purpose requirement of Lemon v. Kurtzman.[7] The gist of plaintiffs' argument is that the preeminent purpose of the statute must necessarily be to aid religion because statistics show that the overwhelming effect of the statute is to aid taxpayers with dependents in sectarian schools. Cf. Stone v. Graham, 449 U.S. 39, 41 (1980) (preeminent purpose of Kentucky statute requiring posting Ten Commandments in public schools classrooms is religious notwithstanding avowed secular purpose). Defendants urge that plaintiffs are "boot strapping" their "secular purpose" attack with the "primary effects" prong of their

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[7]This issue was raised at trial evidently to preserve the right of appeal, but no supporting evidence was proffered at that time.

argument, and that a statute may violate the Establishment Clause and still have a valid secular purpose. See Meek v. Pittenger, 421 U.S. 349, 363 (1975); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). Defendants further urge that section 290.09, subd. 22, has the valid secular purpose of seeking to assist Minnesota taxpayers in providing dependents with a safe, effective and diverse educational environment. Cf. Wolman v. Walter, 433 U.S. 229, 236 (1977) (purpose of Ohio statute authorizing funding for use of nonpublic school children for, inter alia, purchase of secular textbooks was to reflect state's "legitimate interest in protecting the health of its youth and in providing a fertile educational

environment for all the schoolchildren of the State").

The district court found no indicia of an invalid nonsecular purpose of Minn. Stat. § 290.09, subd. 22, 514 F. Supp. at 1001. We concur. The manifest purpose of the challenged statute is to provide all taxpayers a benefit which will operate to enhance the quality of education in both public and private schools.

Plaintiffs focus their constitutional challenge on the "primary effect" of the tuition portion of the statute.[8] At trial they relied upon statistical

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[8]Plaintiffs urge that the effects of the transportation and textbooks deductions are de minimis and do not direct the primary effects portion of their argument at these components of the statute. As the court in M.C.L.U. v. Roemer, 452 F. Supp. 1316 (D. Minn.

calculations based upon data provided by the Minnesota Department of Education indicating that of the 90,954 pupils who attended nonpublic schools in 1979-80,[9]

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8 (continued)

1978), stated:

> [S]ince the state can provide textbooks, Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), and transportation, Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), for parochial school students without offending the Establishment Clause, the statutory deduction for parental expenditures to purchase these items is constitutionally proper.

452 F. Supp. at 1318-19.

Defendants submit that, although the textbook and transportation components are constitutional, their effects are substantial with regard to the statistical evidence involving breadth of affected class.

[9]Plaintiffs inform us in their brief that approximately 820,000 pupils attend public and nonpublic-nonsectarian schools in Minnesota. The record is silent as to this figure.

4.56% attended purportedly nonsectarian schools. During 1978-79, 3.71% of the 88,524 pupils in nonpublic schools attended nonsectarian schools. Plaintiffs urge here that the State loses over 2.4 million dollars in revenue from this deduction and that 71% of this amount is due to benefits given to parents with dependent children in sectarian schools. Plaintiffs assert that these facts, coupled with the fact that Minnesota public schools are tuition-free to most residents, show that the overwhelming percentage of tax relief granted under the statute is for tuition expenditures for religiously-affiliated education. Therefore, it is argued that the primary effect of the statute is the support and advancement of religion, thus falling within the purview of Committee

for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979); and Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980).

Defendants oppose this argument on both factual and legal grounds. Plaintiffs' statistical evidence is challenged on the grounds that it fails to account for tax benefits running to taxpayers with dependents in public and nonsectarian private schools with ordinary tuition expenses, with textbooks and transportation expenses, and with summer school and driver's education class tuition expenses. The district court found that plaintiffs' statistical argument contained "omissions of serious

significance" and held that the benefited class under Minn. Stat. § 290.09, subd. 22, was sufficiently broad that the primary effect did not serve to promote or inhibit religion. 514 F. Supp. at 1002-03.

Defendants also claim that a de jure, not a de facto, analysis is the proper test in ascertaining the breadth of the benefited class. Defendants submit that the Supreme Court has adopted the de facto approach urged by plaintiffs only when confronted with a statute that does not extend its benefits to a broad class of beneficiaries. Compare Walz v. Tax Commission, 397 U.S. 664 (1970); Board of Education v. Allen, 392 U.S. 236 (1968); and Everson v. Board of Education, 330 U.S. 1 (1947) (broad class) with Committee for Public Education & Liberty

v. Nyquist, 413 U.S. 756 (1973); and Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979) (narrow class).

Defendants urge that Minn. Stat. § 290.09, subd. 22, is a general welfare measure, that any benefits flowing to religious schools by way of possible incentive to taxpayers to send their dependents to private school are both remote and incidental, that the primary benefit is to individual parents and students, and that such a tuition and transportation deduction has been authorized since 1955. These factors, it is argued, when viewed in light of the breadth of the affected class of beneficiaries, precipitate toward a finding of neutrality.

Plaintiffs rely upon Committee for

Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). In Nyquist, the Supreme Court found unconstitutional a New York tax statute which authorized taxpayers with children attending nonpublic elementary and secondary schools to "deduct" a stipulated amount from adjusted gross income. Because the amount of the deduction was predicated on and graduated according to the taxpayer's income, not actual tuition expenses incurred, the Court observed that the "deduction" operated more as a hybrid tax "credit." 413 U.S. at 789. However, the Court's decision did not turn on this technical label, and a decision as to the constitutionality of a genuine tax deduction was specifically reserved. 413 U.S. at 789, 790 n.49. The Nyquist Court

characterized the arbitrary deductions as a type of "'forgiveness' in exchange for performing a specific act which the State desires to encourage," 413 U.S. at 789, and described the encouraged act as "sending [his] children to nonpublic schools.' 413 U.S. at 791. These factors, plus the fact that the "deduction" was limited to the narrow class of nonpublic schools, were of primary importance to the Nyquist Court. 413 U.S. at 794.[10]

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[10]The court in Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem. 442 U.S. 907 (1979), relied heavily on Nyquist in holding unconstitutional a new Jersey law providing a $1,000 tax exemption per dependent attending nonpublic schools only. The narrowness of the class and the arbitrariness of the tax relief were emphasized by the court.

Since the three-judge decision in M.C.L.U. v. Roemer, the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980), held unconstitutional a Rhode Island tax statute which was nearly identical to the challenged Minnesota statute. The Norberg court found that, although a deduction was available to taxpayers with dependents attending public and nonpublic schools, 94% of students attending nonpublic and tuition-funded public schools attended sectarian schools. 630 F.2d at 859. The Norberg court distinguished the Roemer decision on the grounds that the exact nature of the benefited class in Roemer never became known since the parents had stipulated that only "some" students whose parents

were eligible for the tax benefit attended sectarian schools.[11] The First Circuit concluded that

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[11] Norberg's distinction of Roemer is somewhat dubious. The stipulation in Roemer was deemed relevant only in conjunction with the textbook and transportation deductions. In discussing the textbook deduction in Roemer Judge Devitt observed:

> [T]he stipulation of facts recites only that some taxpayers who claim the deduction have dependents who attend parochial schools. Stipulation, ¶ 8. Thus, the facts presented do not indicate that this facially neutral statute is being employed to primarily benefit parochial school students. Unlike the enactment challenged in Marburger, this statute ". . . merely makes available to all children the benefits of a general program . . ." Board of Education v. Allen, 88 S.Ct. at 1926. Of course, this analysis only extends to plaintiffs' concessions with respect to textbooks and transportation. Facial neutrality is not controlling with respect to the forbidden forms of aid.

M.C.L.U. v. Roemer, 452 F. Supp. 1316, 1319 n.2 (D. Minn. 1978).

the evidence in Norberg showed that the overwhelming majority of the parents eligible for the tuition deduction send their children to sectarian schools. 630 F.2d at 861.

The district court in Norberg also found that the fact that the Rhode Island statute included a deduction for "'other instructional materials and equipment' in addition to books [made] the likelihood of entanglement even greater . . . because the government would not only have to supervise the parents' purchases, but it would have to supervise the parochial schools themselves to ensure that the 'instructional materials' were not to be used in the course of religious instruction." Rhode Island Federation of Teachers v. Norberg, 479 F. Supp. 1364,

1372 (D. R.I. 1979). On appeal this decision was affirmed.[12]

We find that the constitutional issues present under the Minnesota

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[12]On appeal the First Circuit observed:

> The difficulty with this provision is not that the secular nature of the textbooks and instructional material for which deductions must be taken could not be guaranteed; it is that the involvement of church and state necessary to guarantee that result would excessively entangle church and state. See generally Surinach v. Pesquera de Busquets. 604 F.2d 73 (1st Cir. 1979). The district court correctly distinguished this case from those in which the state determines in advance of the purchase the secular nature of texts and instructional materials. We agree that continuing surveillance would be necessary to ensure that equipment which can be used for both secular and sectarian purposes, such as tape recorders and projectors, are used only for secular purposes.

Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 862 (1st Cir. 1980).

statute require more than facile solution; obviously the First Circuit's conflicting analysis in Norberg is cause for grave concern. The challenged statutes in both cases are identical; the overall proofs are almost identical and similarly uninformative.[13]

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[13]In this regard both cases develop little more than proofs of the percentage of parents who send their children to sectarian schools as related to all "eligible" parents who send their children to nonpublic schools. As the district court observed:

> [P]laintiffs project that at its theoretically broadest scope 14-18% of the taxpayers qualifying for a tuition deduction under the challenged statute do so by reason of expenses related to nonsectarian schooling. Defendants contend, however, that plaintiffs have incorrectly assumed that only full-time tuition payments are relevant and have ignored such items as tuition for summer school and for certain other courses such as driver's education that are also tax deductible. Thus, defendants argue,

Nevertheless, our analysis places us in apparent disagreement with Norberg. We find the issue before us significant

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13 (continued)

> the number of students for whom tuition tax deductions are available is not limited to the 3,360 full-time nonsectarian students as suggested by plaintiffs. Further, the affidavit of Ronald Moir states that over two million dollars were paid in tuition expenses to public schools. Plaintiffs' failure to include these types of tuition deductions as well as a variety of other charges depreciates the significance of their figures and calculations. The defendants further contend the allowable deductions for textbooks and transportation are not de minimus [sic] and must be considered. That thus, on a factual basis, the statute in application satisfies even a broad constitutional test of neutrality.

Mueller v. Allen, 514 F. Supp. 998, 1002 (D. Minn. 1981).

If a strict de jure analysis were advocated, one would be inviting legislatures to enact facially neutral statutes which could operate as mere sham. If a pure de facto approach were taken, a statute's constitutionality

not only to the State of Minnesota but to the nation. Eventually, if not within the parameters of this case, the Supreme Court must decide whether statutes such as those in Rhode Island and Minnesota can survive constitutional scrutiny.

Transportation.

No one seriously challenges the transportation deduction. If state financed transportation is permissible under Everson v. Board of Education, 330 U.S. 1 (1947), surely an indirect tax deduction to all Minnesota parents is

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13 (continued)

might turn on local annual statistics. That is, the same statute might be constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools. Nothing so rigid or so arbitrary can be gleaned from precedent in this area.

constitutional. In Everson the statute was upheld not because the financial benefit was directed at parents but because the benefits were directed to all parents in the community at large. See 330 U.S. at 16. Clearly the primary effect of the transportation deduction of the Minnesota statute is not to aid the establishment of religion. See also Minn. Stat. Ann. §§ 123.76-123.80 (West Supp. 1982) (authorizes state to provide public transportation to parochial school students).

Textbooks.

Similarly, we find the tax deduction for secular textbooks and "instructional materials and equipment" to all parents to be constitutional. The deduction for secular textbooks for all parents falls within the constitutional protection of

Board of Education v. Allen, 392 U.S. 236 (1968). See Minn. Stat. Ann §§ 123.931-123.947 (West Supp. 1982) (authorizes state to provide educational aids such as textbooks, standardized tests and pupil support services for nonpublic school children). We acknowledge that the fact that the statute also permits a deduction for "instructional material and equipment" is troublesome. Relying upon Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), the First Circuit in Norberg found these deductions objectionable. See also Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D. N.J. 1973), aff'd mem., 417 U.S. 961 (1974).

We view Meek, Wolman, and Marburger as distinguishable. In those cases

massive loans of instructional materials and equipment were made directly to the institutions themselves. As the Court observed in Meek:

> For the 1972-1973 school year the Commonwealth authorized just under $12 million of direct aid to the predominantly church-related non-public schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. To be sure, the material and equipment that are the subjects of the loan--maps, charts, and laboratory equipment, for example--are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." [Meek v. Pittenger,] 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so

> pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. Hunt v. McNair, 413 U.S. 734, 743.

421 U.S. at 365-66.

In the present case the tax benefit is directed to the parent and the student and not to the school. Although Nyquist finds that this fact alone does not immunize tax benefits to a parent from constitutional attack, we think it is a significant factor as it relates to the type of material and equipment which a student will purchase. The needs of the institution from the standpoint of instructional materials and equipment are distinct from the needs of the student. Instructional equipment equally useful in both secular and religious training by the institution presents a different concern than do supplies which a student

might purchase for classroom use.[14] The difficulties regarding the Establishment Clause evident in Meek and Marburger which involved massive loan programs are much different than those in the instant case where the effect of a possible tax deduction for the purchase of defined secular school materials is much more indirect.

The concerns of the Norberg court with church-state entanglement are well addressed by Judge Renner. He observed:

> The Supreme Court has implicitly recognized that church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and unconstitutional government and

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[14]Although a ruler might be used in a mathematics class, it might also be used to measure mileage on a biblical map. Tennis shoes might be worn to gym class as well as to a religious training period. We question whether such uses might be seriously challenged as aiding religion.

religion entanglements. See Walz, 397 U.S. at 674-76 90 S.Ct. at 1414-15. Possible entanglement here is lessened by the fact that eligibility of schools is not determined by an in-depth case-by-case analysis of the genuineness of the schools' religious functions. Eligibility is clearly established if a school meets certain entirely secular requirements: nonprofit status, compliance with compulsory attendance laws, and adherence to state and federal civil rights statutes. While there may be times that certain deductions for textbooks or other specific expenses may call for an examination of impermissible purpose, the amount of entanglement will be minimal. Further, the primary enforcement tool will be an individual audit, which would not necessarily entangle the state impermissibly in church affairs. Plaintiffs fail to establish the reasonable likelihood that this section and any accompanying government regulation will involve intrusion into religious matters. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1116 (7th Cir. 1977), aff'd, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979).

Mueller v. Allen, 514 F. Supp. 998, 1003 (D. Minn. 1981).

Tuition.

We now turn to the more difficult

issue of whether the tuition deduction has the primary effect of advancing religion.

The district court emphasizes that the statute is neutral on its face in that it provides a tax deduction for all parents of both public and nonpublic school children. This fact did not deter the Norberg courts from finding that the primary effect of the statute was to aid religion since Rhode Island's public school children attended schools tuition free. In so finding Judge Pettine of the District of Rhode Island observed, "93.4% of the children attending school in Rhode Island whose parents are eligible for the challenged tuition deductions attend sectarian schools." Rhode Island Federation of Teachers v. Norberg, 479 F. Supp. 1364, 1366 (D. R.I. 1979).

Whether the Minnesota statute can withstand constitutional scrutiny turns on whether Nyquist can be distinguished. The Norberg court opined that it could not. We disagree.

The Nyquist Court struck down a direct tuition reimbursement of $50 to $100 per child available to parents with an annual taxable income of under $5,000[15] and a tax "credit" for families with an annual adjusted gross income of less than $25,000. The Court stated that the tax credit was, in form, "a tax deduction since it is an amount subtracted from adjusted gross income prior to computation of tax due." 413 U.S. at 789. However, the "deduction"

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[15]See also Sloan v. Lemon, 413 U.S. 825 (1973).

was not related to the amount actually spent for tuition but was in the form of a predetermined amount of tax "forgiveness." Id. The Nyquist Court concluded:

> In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

413 U.S. at 790-91.

However, the Court specifically excepted from its ruling any decision as

to whether a "genuine tax deduction" is constitutionally acceptable under the "neutrality" test in Walz v. Tax Commission, 397 U.S. 664 (1970). 413 U.S. at 790 n.49. It is, of course, under that cloak of neutrality that defendants now argue.

In Nyquist it was urged that the fact that the New York tax credit was directed to the parent rather than to the schools was controlling. The Court, however, found that this distinction drawn from Everson and Allen was not determinative, that it was but one among many factors to be considered. 413 U.S. at 781. A more significant factor that may be extrapolated from Allen and Everson is the fact that those cases dealt with benefits available to all school

children, whereas the tax benefit in Nyquist was given only to those parents with children in private schools. The Nyquist Court emphasized the importance of the narrowness of the benefited class by comparing the beneficiaries under the New York statute to the broad class of intended beneficiaries in Walz. 413 U.S. at 794. Thus, the New York statute in Nyquist can be distinguished from the Minnesota and Rhode Island statutes on the following basis: (1) the statute in Nyquist operated as a tax credit, not as a true deduction; and (2) the tax benefits in Nyquist were limited to the class of parents of private school children, as opposed to the broad class of parents with dependents in both public and nonpublic schools benefited under the

Minnesota and Rhode Island statutes.[16]

These two factors did not deter with the court in Norberg from invalidating the Rhode Island law. The district court in Norberg found that the tuition deduction was still a charge upon the state. As the court said, it is "the economic equivalent of the state helping to provide for those expenses" and not "an abstention from taxation." The court

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[16]Defendants urge that the fact that the Minnesota statute has been unchallenged since 1955 is made relevant by the discussion of historical acceptance in Walz v. Tax Comm'n, 397 U.S. 664, 677-80 (1970) (Burger, C.J.). We disagree. As the district court noted in Norberg, "The Walz property tax exemptions were upheld not merely because of their long historical acceptance; rather, it was the reason underlying that history of tolerance that proved controlling." Norberg, 479 F. Supp. at 1371 n.9.

viewed it more as a subsidy than as the exemption designed in Walz to minimize the involvement and entanglement between church and state. Norberg, 479 F. Supp. at 1371.

Second, the district court in Norberg found that the fact that in Rhode Island the statute was applicable to parents of public as well as nonpublic school students was "mere window dressing." 479 F. Supp. at 1371. In Rhode Island, the court observed, the overwhelming majority of the taxpayers eligible for the tuition deduction sent their children to sectarian schools. Id.

It is not without difficulty that we reach our decision to sustain the Minnesota law. First, we are concerend with the fact that we are dealing with an indirect state subsidy of tuition which

can be viewed "as an incentive to parents to send their children to sectarian schools, or as a reward for having done so. . . . to preserve and support religion-oriented institutions." Sloan v. Lemon, 413 U.S. 825, 832 (1973). We are well aware that we are not dealing with secular textbooks or bus rides[17] but with tax benefits for tuition payments to elementary and secondary institutions, some of which provide religious training along with secular education. Nonetheless, contrary to plaintiffs' argument, the Minnesota statute has not singled out a class of citizens for a special economic benefit.

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[17] Everson and Allen held that the provision of secular books and transportation to all citizens reflected a neutral posture toward religious institutions.

It is neutral on its face; and, under the facts presented here, we cannot reject this facial neutrality as mere window dressing. In Nyquist and Marburger the only eligible parents were those who send their children to nonpublic schools. In the present case Minnesota has recognized tuition deductions for parents of public school attendees who pay tuition in various forms, i.e., tuition paid by public school students who attend outside their residence districts; summer school tuition; tutoring services; tuition for instruction provided the physically handicapped; and tuition for driver education. Plaintiffs concede that some 14-18% of Minnesota taxpayers qualifying for tuition deductions under the statute do so for expenses related to private nonsectarian schooling. This figure

however does not reflect the number of parents with dependents in public schools who collectively paid in 1978-79 in excess of two million dollars in tuition expenses.

In Nyquist each eligible taxpayer received an arbitrary deduction resulting in a definite tax benefit. In Norberg Rhode Island taxpayers' state income tax was directly related to a percentage of federal income tax and the amount of tax benefit from the challenged deduction depended upon the amount of the deduction and the federal income tax bracket. The court concluded that a tax benefit would result for any parent who owed federal income tax and paid tuition of dependents attending qualifying schools. It was estimated that eligible taxpayers in Rhode Island would receive an average tax

benefit of $33 from the deduction. Such is not the case in Minnesota. Under the Minnesota statute the state tax is not related to federal income tax, and whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayer from a higher tax bracket to a lower one. Thus, in this sense, the indirect tax benefit to the school is more diffused and less certain. Unlike the statute in Nyquist, there is within the Minnesota statute no "legislative attempt to assure that each family would receive a carefully estimated net benefit." Nyquist, 413 U.S. at 790.

Contrary to the Norberg reasoning, we find that the Minnesota deduction available to all citizens should be viewed much the same as a charitable

deduction. See I.R.C. § 170. A statistical breakdown of beneficiaries is not necessary to conclude that the tax "forgiveness" provided in federal and state tax deductions for charitable contributions substantially benefits sectarian institutions. This creates a much greater, although indirect, subsidy of state and federal tax dollars to religious institutions than does a deduction for tuition payments to sectarian schools. Although the Supreme Court has never decided whether charitable deductions made available to all citizens are constitutional, we use the comparison merely to identify the imponderable problem presented if one is allowed to challenge a neutral statute made applicable to all citizens by a purely de facto analysis utilizing

statistical proofs. The fundamental issue is not whether some or even a substantial benefit accrues to a religious institution, but whether the principal or primary effect of the statute is to advance religion. Tilton v. Richardson, 403 U.S. 672,679 (1971).

In Nyquist the statute limited the class benefited to the parents of children in nonpublic schools. The Court emphasized that "it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor." Nyquist, 413 U.S. at 794. Here, as in Everson and Allen, all citizens are made eligible for the tax benefits. One of the problems, however, in giving blind adherence to Everson and Allen is the fact that in

both cases transportation and textbooks were not already furnished free by the statute to public school children. But what if they were? Would the amendment of the statute to include parochial students have been struck down as having been passed for religious purposes or having a primary effect of aiding religious schooling? We think not--at least under the Supreme Court's reasoning. State transportation in Everson was viewed as having a public purpose and fulfilling a public need. The mere fact that it coincided with individual desires to send children to a parochial school was deemed an inadequate reason to strike down the law.

There is no doubt that Minnesota could limit its tax deduction for tuition expenses to those parents in the public

school system required to pay tuition. This could easily be deemed a public need--even though it would affect only a minority of taxpayers with dependents in the public school system. On the other hand, if a state wishes to extend such tax benefits "to all its citizens without regard to their religious belief," it should be allowed to do so. Everson, 330 U.S. at 16. As the Supreme Court surmised in Roemer v. Board of Public Works, 426 U.S. 736, 746 (1976), parents who send their children to sectarian schools "need not be quarantined from public benefits that are neutrally available to all."

Notwithstanding plaintiffs' statistical arguments, which arguably indicate that the greater number of the class benefited are parents of church

school children, we find that there are substantial benefits flowing to all members of the public. By way of deduction we conclude, as defendants urge, that the State, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the State has adopted a policy which is neutral toward religion by providing a tax benefit to those parents who qualify for a deduction for expenses incurred in sending their child to school.

Conclusion.

We have applied the three-pronged test of Lemon v. Kurtzman and hold that Minn. Stat. § 290.09, subd. 22, does not violate the Establishment Clause. We acknowledge that this case falls in the

gray area lying between constitutionally-upheld tax exemptions, see Walz, and unconstitutional tax "credits," see Nyquist. We have weighed all the factors; and, while we recognize the bestowing of some benefit to church-affiliated schools, we also find that any benefit to religion or involvement between church and state is so remote and incidental that the challenged deduction does not violate the constitutional wall separating church and state. We find that the dangers of Minn. Stat. § 290.09, subd. 22, are quite far removed from those dangers which prompted inclusion of the Establishment Clause in the Bill of Rights. Justice Powell stated in his concurring opinion in Wolman v. Walter:

> Our decisions in this troubling

area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in Meek v. Pittenger, 421 U.S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind--even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. Meek itself would have to be overruled, along with Board of Education v. Allen, 392 U.S. 236 (1968), and even perhaps Everson v. Board of Education, 330 U.S. 1 (1947). The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a

> legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

Wolman v. Walter, 433 U.S. 229, 262, (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Van D. Mueller, et al, Plaintiff, vs. Clyde E. Allen, Jr., et al, Defendant, and Dennis J. Berthiaume, et al, and Brenda B. Becker, et al, Intervenor-Defendants.	)	MEMORANDUM AND ORDER Civil 3-80-395

This action challenges the constitutionality of Minn. Stat. § 290.09(22) (1978), as violative of the

First and Fourteenth Amendments to the Constitution of the United States. Plaintiffs assert that the challenged statute is a law advancing an establishment of religion and is in restraint of the free exercise of religion. Accordingly, plaintiffs seek a judgment by this Court invalidating the statute and an injunction against its enforcement by the State of Minnesota.

Initially, suit was brought by five individual plaintiffs on behalf of the taxpayers of the State of Minnesota. Pursuant to defendant Allen's motion, three of the plaintiffs were dismissed from the lawsuit. See Memorandum and Order, dated Oct. 14, 1980. Dismissal was based upon the doctrine of res judicata in that the three plaintiffs were found to have had an interest in

M.C.L.U. v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978), an action that upheld the challenged statute against a constitutional challenge similar to the one now being advanced. This Court denied defendant's motion to dismiss the remaining plaintiffs, holding that Roemer was not a representative taxpayers' suit and, thus, did not bar the present taxpayers from bringing this action. The Court did not decide the stare decisis effect of Roemer since the factual record was, at that time, incomplete. At present, the factual basis of the case is not in dispute, although the parties differ as to inferences to be drawn and their legal consequences. Summary judgment is now appropriate.

I. FACTS

Intervenor-defendants Berthiaumes,

Dziks, and Fujans contend, as a preliminary matter, that the affidavits of James A. Lee and Phillip C. Miller, submitted by plaintiffs, should not properly be considered. The Lee affidavit purports to reveal the results of his examination of certain records of the Minnesota Department of Education relating to amounts of tuition paid by public school children. This information is offered to support plaintiffs' statistical argument.

Defendants object to Lee's affidavit on the ground that it is hearsay and barred by Fed. R. Civ. P. 56(e) and Fed. R. Evid. 901 since the affidavit fails to show that Lee possesses any personal knowledge of the matters contained in the affidavit. Defendants also argue that

the affidavit is barred by Fed. R. Evid. 1002, in that the orginals of the documents have not been produced. Since Lee's affidavit purports to summarize portions of certain state records, defendants contend that such secondary evidence may not be submitted. Finally, defendants challenge the affidavit for failing to include sworn or certified copies of the documents and records referred to, thus contravening Fed. R. Civ. P. 56(e).

Miller's affidavit is objected to on the grounds that it is hearsay; also that it has not been authenticated as required by Fed. R. Civ. P. 56(e) and Fed. R. Evid. 901. Defendants contend it is not possible to determine from the affidavit whether Miller is competent to authenticate the exhibit; that since

Miller has no connection with the Minnesota Department of Revenue, he lacks personal knowledge of the information he seeks to convey.

There may well be merit to defendants' objections, but, for purposes of this opinion, they are not being considered.

The challenged statute, section 209.09(22), authorizes Minnesota taxpayers to claim income tax deductions for their dependents' tuition, textbook, and transportation expenditures. The provision was orginally enacted in 1955 and subsequently amended in 1976. Section 290.09(22) is a "true tax deduction statute. It does not provide direct financial aid to its beneficiaries; it does not directly subsidize any activity; and it does not

operate as a credit against a tax already determined. Qualifying expenditures are deductible only in their actual amounts and are subject to certain maximums. The deductions are subtracted from gross income and thus reduce the tax base. They result in a tax benefit only if the deduction moves the taxpayer into a lower tax bracket.

Deductions are subject to a maximum of $500 for each elementary school dependent and $700 for each secondary school dependent. There are three categories: Tuition; transportation; and textbooks.

Tuition includes:

1. Tuition in the ordinary sense.
2. Tuition to public school students who attend public

schools outside their residence school districts.

3. Certain summer school tuition.
4. Tuition charged by a school for slow learner private tutoring services.
5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.
6. Tuition charged by a private tutor or by a school that is not a elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.
7. Montessori School tuition for

grades K through 12.

8. Tuition for driver education when it is part of the school curriculum.

Allowable deductions for transportation expenditures include the cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who live in one district but attend school in another, and the cost of transporting students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance.

Textbook deductions include not only secular textbooks but also other necessary equipment, such as:

1. Cost of tennis shoes and sweat-

suits for physical education.

2. Camera rental fees paid to the school for photography classes.
3. Ice skates rental fee paid to the school.
4. Rental fee paid to the school for calculators for mathematics classes.
5. Costs of home economics materials needed to meet minimum requirements.
6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
7. Costs of supplies needed to meet minimum requirements of art classes.
8. Rental fees paid to the school for musical instruments.
9. Cost of pencils and special

notebooks required for class.

II. DISCUSSION

A. The stare decisis effect of the Roemer case.

In Roemer, a three-judge district court upheld the constitutionality of the statute. That court held the statute to be neutral and neither advances nor impedes religious activity, that it benefits the parents of children attending both public and private schools, has received unchallenged historical acceptance, and is analogous to the long-recognized practice of tax deductible contributions to religious and charitable organizations. Roemer, 452 F. Supp. at 1321-22.

A court is not irretrievably bound by its own precedents, but in the interests of uniformity, stability, and certainty

in the law, will follow the rule of law established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent. 1B Moore's Federal Practice ¶0.402[3.-1] (1965 & Supp. 1980-81). However, a court's decision is not binding upon courts of equal rank. Moreover, a specially convened three-judge district court is still a district court. Farley v. Farley, 418 F.2d 1009, 1012 (2d Cir. 1973) (decision of a three-judge district court is no more of a precedent than any other district court decision and is not binding on another district court.).

Thus, this court is not bound by the Roemer ruling. But, this does not mean

that the prior ruling is without value in the adjudication of this case. The same issues raised by the parties here were raised in Roemer. Plaintiffs contend that not only was Roemer incorrectly decided, but that subsequent case law and facts not before the Roemer court establish the unconstitutionality of the challenged statute. An examination of the underlying issues is thus required.

Only one aspect need be discussed in detail, since the new facts offered by plaintiffs relate only to the "primary effect" element of the Establishment Clause Test. The remaining elements were handled adequately in Roemer and plaintiff offers nothing new challenging its analysis and conclusions.

B. Whether section 290.09(22) violates the Establishment Clause of the First

Amendment.

The Supreme Court has formulated a three-prong test by which the constitutionality of legislative action allegedly benefitting religious activity may be judged. In order to comport with the directive of the Establishment Clause such action must: (1) have a secular legislative purpose; (2) its principal or primary effect must be such as to neither advance nor inhibit religion; and (3) the action must not foster an excessive entanglement of the state in religious affairs. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Plaintiffs contend that the challenged statute does not satisfy the "secular purpose" segment of the Establishment Clause test, but decline discussion of the issue at this time.

Since failure to satisfy any one of the three elements of the test requires a declaration of unconstitutionality, plaintiffs raise the issue solely for purposes of possible subsequent appeal. Defendants contend that the statute has a secular purpose since it seeks to assist Minnesota taxpayers in providing dependents with a safe, effective, and varied educational environment. Such a legislative purpose is presumptively valid and plaintiffs have not indicated any circumstances to rebut that presumption. Lemon, 403 U.S. at 613.

Plaintiffs' major attack on section 290.09(22) centers on the "primary effect" element of the Lemon test. Specifically, plaintiffs contend that the tuition component of the challenged statute has the primary effect of

advancing religion and religious activity. Although the tuition credit is available to all taxpayers regardless of whether their dependents attend sectarian or nonsectarian schools, plaintiffs assert that at least 82% and perhaps upward to 96% of the students who pay tuition attend sectarian schools. Thus, plaintiffs urge, section 290.09(22) is not a tax measure providing broad relief to the general public, but is directed toward and has the primary effect of advancing religion. Plaintiffs contend that the primary focus of the Court's analysis should be on the tuition component of the deduction since the permissible textbook and transportation deductions are de minimus.

Plaintiffs statistical calculations are based on data provided by the

Minnesota Department of Education indicating that 90,954 pupils attended nonpublic schools within the State during 1979-80. Of these, 4.56% attended schools purporting to be nonsectarian. During the 1978-79 school year, 3.71% of the 88,524 students attending nonpublic schools attended nonsectarian schools. These figures allegedly show that, in actuality, taxpayers qualifying for benefits under the law do so in the overwhelming number of instances by reason of tuition payments for religious education. Plaintiffs, in essence, attack the facial neutrality of the statute, asserting that its actual effect is skewed toward the advancement of religion, thus falling within the prohibition prescribed in Committee for Public Education v. Nyquist, 413 U.S. 756

(1973); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd, 442 U.S. 907 (1979); and Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). These cases are largely distinguishable from the one at hand. See Memorandum and Order, dated Oct. 14, 1980, pp. 4-7.

Defendants, in turn, challenge plaintiffs' argument on both legal and factual grounds. Defendants argue, first, that there is no Supreme Court authority supporting plaintiffs' contention that the breadth of class issue requires a factual inquiry when the class includes both public and private school children, that is, a facially neutral statute. Defendants' argument is weakened by the fact that the Supreme Court has never had the issue before it

for resolution. See Nyquist, 413 U.S. at 782 n.38. It is certainly plausible that if faced with the precise issue, the Court might require a factual inquiry into the breadth of the affected class, even when the class includes both public and private school children. See id.; Norberg, 630 F.2d 585.

Defendant also vigorously argue that there are errors in plaintiffs' factual and statistical data. From their data, plaintiffs project that at its theoretically broadest scope 14-18% of the taxpayers qualifying for a tuition deduction under the challenged statute do so by reasons of expenses related to nonsectarian schooling. Defendants contend, however, that plaintiffs have incorrectly assumed that only full-time tuition payments are relevant and have

ignored such items as tuition for summer school and for certain other courses such as driver's education that are also tax deductible. Thus, defendants argue, the number of students for whom tuition tax deductions are available is not limited to the 3,360 full-time nonsectarian students as suggested by plaintiffs. Further, the affidavit of Ronald Moir states that over two million dollars were paid in tuition expenses to public schools. Plaintiffs' failure to include these types of tuition deductions as well as a variety of other charges depreciates the significance of their figures and calculations. The defendants further contend the allowable deductions for textbooks and transportation are not de minimus and must be considered. That thus, on a factual basis, the statute in

application satisfies even a broad constitutional test of neutrality.

Defendants point also to the statute's operation as a "true deduction" as supporting the conclusion that the section does not have a primary effect of advancing religion. The Supreme Court has never decided the constitutionality of such a deduction for educational expenses. See Nyquist, 413 U.S. at 790 n.49. The nature of a deduction as opposed to a credit makes the benefit more remote. The significance of this characterization is that the more remote and indirect the benefit conferred, the more likely it will be upheld. Walz v. Tax Commission, 397 U.S. 664, 672-76 (1970).

As discussed in Roemer, the key determination to be made here is whether

the case is closer contitutionally to Nyquist or to Walz as to the benefit being conferred on religious institutions. This Court concurs in the analysis and judgment reached in Roemer that Walz is the closer controlling precedent. Moreover, the factual presentation here, rather than undercutting the Roemer decision, provides the factual support that was absent but assumed in that case. The defendants have shown that the statute provides widely distributed tax relief. Such relief is available to all parents with dependents attending elementary and secondary schools. This is a critical element since a law does not advance religion when its benefits are neutrally and widely distributed and from which religious institutions benefit only

incidentally and indirectly. Walz, 397 U.S. at 672-76. This conclusion is buttressed by the long-standing acceptance of an analog to section 290.09(22): deductibility of charitable and religious contributions from federal and state income taxes.

Plaintiffs further contend that the statute fails to satisfy the excessive entanglement test since the State's enforcement responsibility carries with it the danger of an impermissible entanglement of government in religious affairs. The Roemer court dismissed this argument as unsubstantial. Roemer, 452 F. Supp. at 1318 n.1. The Supreme Court has implicitly recognized that church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and

unconstitutional government and religion entanglements. See Walz, 397 U.S. at 674-76. Possible entanglement here is lessened by the fact that eligibility of schools is not determined by an in-depth case-by-case analysis of the genuineness of the schools' religious functions. Eligibility is clearly established if a school meet certain entirely secular requirements: non-profit status, compliance with compulsory attendance laws, and adherence to state and federal civil rights statutes. While there may be times that certain deductions for textbooks or other specific expenses may call for an examination of impermissible purpose, the amount of entanglement will be minimal. Further, the primary enforcement tool will be individual audit, which would not necessarily

entangle the state impermissibly in church affairs. Plaintiffs fail to establish the reasonable likelihood that this section and any accompanying government regulation will involve intrustion into religious matters. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1116 (7th Cir. 1977), aff'd, 440 U.S. 490 (1979).

C. Whether section 290.09(22) violates the Free Exercise Clause of the Constitution.

Plaintiffs argue that by permitting some citizens to reduce the amount of tax paid to the State the statute operates to single out for lessor burdens certain forms of religious activity. It, thus, increases amounts other citizens must contribute to support predetermined levels of state expenses. This argument

tends to overlook the deductions which are available to public school parents, the substantial revenues received by public school districts, and the fact that taxpayers who have dependents in nonpublic schools save remaining taxpayers the costs of educating those dependents. Moreover, plaintiffs have not alleged how their religious beliefs are infringed. McGowan v. Maryland, 366 U.S. 420, 429-30 (1968).

III. CONCLUSION

Plaintiffs have failed to convince the Court that Roemer was incorrectly decided or that there are additional facts that demonstrate the statute has the primary benefit of advancing religion. Plaintiffs' statistical argument lacks credibility by reason of omissions of serious significance. The

statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The statute is constitutional and summary judgment in favor of defendant shall be entered.

Based on the foregoing, the record, and the briefs and arguments of counsel,

IT IS HEREBY ORDERED that

1. Plaintiffs' Motion for Summary Judgment is denied.

2. Defendant's Cross-Motion for Summary Judgment is granted.

3. Plaintiffs' Complaint is hereby dismissed.

Dated: May 13, 1981.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 81-1569

Van D. Mueller, etc., et al,

Appellants,

vs.

Clyde E. Allen, Jr., etc., et al,

Appellees.

This appeal from the United States District Court for the ----- District of Minnesota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and

the same is hereby, affirmed in accordance with the opinion of this Court.

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit